

RECEIVED
FEDERAL ELECTION
COMMISSION

2012 MAY 15 AM 10:24

CELA

FEDERAL ELECTION COMMISSION

999 E Street N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

MUR 6441

DATE COMPLAINT RECEIVED: 02/28/2011

DATE OF INITIAL NOTIFICATION: 09/19/2011

**DATES OF SUPPLEMENTAL NOTIFICATIONS:
09/27/2011 & 01/19/2012**

**DATE RESPONSES RECEIVED: 02/28/2011,
10/28/2011 and 02/13/2012**

DATE ACTIVATED: 02/15/2012

EXPIRATION OF SOL: 10/20/2015

COMPLAINANT:

Melody M. Bradshaw

RESPONDENT:

Unknown Respondent¹

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441d
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

FEC Database

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter involves allegations that unknown persons or entities sponsored and distributed three mailers to residents in the 5th Congressional District of Virginia prior to the general election for the House of Representatives without disclaimers identifying who was responsible for the mailers as required by the Federal Election Campaign Act of 1971, as

¹ This office initially notified the principal campaign committees for each of the three candidates mentioned in the mailers -- Committee to Elect Jeff Clark for Congress, Robert Hurt for Congress, and Perriello for Congress. Based on a newspaper article reporting on mailers circulated in the campaign, OGC also notified the Democratic Congressional Campaign Committee of the complaint in this matter. After further review, OGC has advised all four committees that, based on currently available information, they are not currently respondents in this matter.

1 amended ("Act") and the Commission's regulations. *See* 2 U.S.C. § 441d; 11 C.F.R. § 110.11.

2 The mailers comment on three different 5th Congressional District candidates' purported
3 positions on higher taxes. None of the mailers identifies who was responsible for their
4 dissemination.

5 For the reasons discussed below, we recommend that the Commission: (1) find reason to
6 believe that one or more unknown respondents violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11
7 by failing to affix the proper disclaimer on the three anonymous mailers; and (2) authorize the
8 use of compulsory process in this matter, including the issuance of appropriate interrogatories,
9 and document subpoenas, as necessary.

10 **II. FACTUAL BACKGROUND**

11 Jeffrey Clark, an independent, Thomas Stuart Price Perriello, a Democrat, and Robert
12 Hurt, a Republican, were candidates for the House of Representatives in the 5th Congressional
13 District of Virginia in the 2010 general election. Their respective principal campaign
14 committees were the Committee to Elect Jeff Clark for Congress ("Clark Committee"); Robert
15 Hurt for Congress and John G. Selph, in his official capacity as treasurer ("Hurt Committee");
16 and Perriello for Congress and Anna Scholl, in her official capacity as treasurer ("Perriello
17 Committee"). Shortly before the election, three mailers were circulated to residents of the 5th
18 Congressional District. Complaint, Attachments 1-3. The three mailers do not identify who
19 disseminated them. Each mailer contains a legible bulk mail permit number. *Id.*

20 The three mailers praise Clark for his opposition to higher taxes and criticize the other
21 candidates for their support for higher taxes. *See* Complaint, Attachments 1-3. The first two
22 mailers compare the tax policy positions of Clark and Hurt and encourage readers to "Call
23 Robert Hurt and tell him to stop supporting higher taxes." Complaint, Attachments 1 and 2. The

1 third mailer compares the tax policy positions of Clark, Hurt, and Perriello and praises Clark
2 while criticizing the other candidates. Complaint, Attachment 3. That mailer encourages readers
3 to "Tell your policy makers to support the Budget Enforcement Act." *Id.*

4 **III. LEGAL ANALYSIS**

5 The Act and Commission regulations provide that, whenever a political committee
6 finances any communication through any mailing or other type of general public political
7 advertising, the communication must clearly state that the communication has been paid for by
8 that political committee. 2 U.S.C. § 441d(a). This requirement applies regardless of whether it
9 contains express advocacy. Such a communication would include a "mass mailing or any other
10 form of general public political advertising." 11 C.F.R. § 100.26. A "mass mailing" is defined
11 as a mailing of more than 500 pieces of mail matter of an identical or substantially similar nature
12 within any 30-day period. 2 U.S.C. § 431(23). "Substantially similar" means communications
13 that include substantially the same template or language, but vary in non material respects.
14 11 C.F.R. §§ 100.27 and 100.28. If a disclaimer is required, it must provide the name,
15 permanent street address, telephone number, or Internet address of the individual paying for the
16 communication. 11 C.F.R. § 110.11(b)(3).²

17 The complaint alleges that the mailers did not identify who authorized or paid for them.
18 At present, the available information is insufficient to determine who was responsible for the
19 mailers. Consequently, an investigation is required to determine whether the responsible party
20 was a political committee, an individual paying for a communication authorized by a candidate,
21 or an individual acting independently (in which case no disclaimer would be required).

² Public communications made by any person other than a political committee must include a disclaimer only if the communication (1) contains express advocacy; (2) solicits contributions; or (3) is an electioneering communication. 2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(2)-(4).

1 The three separate mailers contain photos, and appear to have been professionally
2 produced. While we are unable to determine the quantity or cost of the mailers, the quality of the
3 mailers suggests that the related disbursements may have been more than *de minimis*. The
4 mailers use the same bulk mail permit number, moreover, suggesting that they were paid for by
5 the same entity. Further, because the postal permit indicates that the mailers were sent by regular
6 mail, at least 200 pieces of each mailer were sent, or not less than 600 total mail pieces.³ It is
7 therefore likely that the quantity requirements for a mass mailing were met. And, if the quantity
8 requirements were met, and if the mailers were paid for by a political committee, the Act would
9 require the mailers to clearly state the entity responsible for financing the mailers. 2 U.S.C.
10 § 441d; 11 C.F.R. § 110.11.

11 The Commission has previously approved reason to believe findings in a matter
12 involving anonymous mailings. In MUR 5493 (Friends of Jeff Smith), for example, OGC
13 recommended and the Commission found reason to believe in a case involving allegations that a
14 political committee disseminated a postcard critical of an incumbent that did not contain express
15 advocacy. The Commission authorized a limited investigation to confirm the identity of the
16 unknown respondent in that matter by tracing the bulk mail permit number on the postcards.
17 MUR 5493 (Friends of Jeff Smith), FGCR at 13.⁴

18 More recently, however, in MUR 6429 (Unknown Respondents), by a 2-3 vote, the
19 Commission failed to approve an OGC recommendation to find reason to believe that unknown
20 respondents violated the disclaimer provisions of section 441d. The respective positions of the

³ The U.S. Postal Service requires at least 200 pieces be sent in order to qualify for the standard bulk mail discount. See <http://pc.usps.com/businessmail101/getstarted/bulkmail.htm>.

⁴ In addition to the postcard, the matter also involved the dissemination of "false and inflammatory information" in the form of three anonymous flyers. After conducting an investigation to determine the owner of the bulk mail permit number and investigating two authorized committees, OGC recommended that the Commission take no further action. MUR 5493, Certification (Aug. 16, 2005).

1 voting Commissioners were described in two Statements of Reasons ("SORs"). The SOR
2 favoring a no reason to believe finding concluded that the complainant merely speculated that a
3 political committee disseminated the mailer at issue, and without particular factual allegations
4 concerning the identity of the speaker, the complaint was inadequate to support investigation into
5 the protected area of anonymous First Amendment speech. *See* SOR of Commissioners Hunter,
6 McGahn, and Petersen at 5-9, MUR 6429. The SOR further distinguished MUR 5493 on the
7 grounds that the complaint in that MUR identified two particular committees for investigation
8 and those committees had been afforded notice and opportunity to respond. *Id.* at 6-7.

9 The other SOR in MUR 6429 would have approved the reason to believe recommendation.
10 That SOR reasoned that a complaint need not provide conclusive evidence of a violation before
11 an investigation may proceed, and concluded that the complaint presented sufficient information
12 to open a limited investigation to determine whether a political committee engaged in the
13 challenged communication. It further took the position that no First Amendment protection for
14 anonymous speech precluded the proposed FEC inquiry. *See* MUR 6429, SOR of
15 Commissioners Bauerly and Weintraub.

16 As noted, we previously recommended proceeding in both MUR 5493 (Friends of Jeff
17 Smith) and MUR 6429 (Unknown Respondents), and we make the same recommendation here.⁶

⁶ This Office has recommended the Commission take no further action or dismiss matters involving potential disclaimer violations where, unlike the present matter, (1) even in the absence of a complete disclaimer the identity of the sender could be ascertained from the content of the communication or (2) there was no investigative lead that could be used to discover the identity of the party that paid for the communication. *See* MUR 6429, SOR of Hunter, McGahn, and Peterson (listing prior MURs).

**MUR 6441 (Unknown Respondent)
First General Counsel's Report**

1 The present matter is well suited to a limited investigation to determine the source of the
2 challenged mailers. The bulk permit number and postal category provide a clear and
3 straightforward lead from which to trace the source of the mailers. The professional presentation
4 and the use of a bulk mail permit number could be an indication that it is more likely that an
5 organization, such as a political committee, was responsible for their dissemination. Although
6 the available information is not conclusive as to whether a political committee was responsible
7 for the mailers, at this stage of the proceeding it is sufficient to support a reasoned belief that a
8 violation of the Act and regulations may have occurred.

9 No First Amendment interest would be impinged by the circumscribed investigation
10 proposed here. At this time, no finding of any violation is sought as to any particular political
11 committee. Further, the Supreme Court has expressly held that disclaimer requirements for
12 campaign spending and advertisements related to federal elections do not offend the First
13 Amendment. *Buckley v. Valeo*, 424 U.S. 1, 66 (1976); *Citizens United v. FEC*, 130 S. Ct. 876,
14 914 (2010); s

15
16
17
18
19 Accordingly, the proposed investigation would be an appropriate
20 application of the Commission's resources.

21 For these reasons, we recommend that the Commission find reason to believe that an
22 unknown person or persons violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by failing to affix
23 the appropriate disclaimer on the three anonymous mailers. Further, we recommend that the

MUR 6441 (Unknown Respondent)
First General Counsel's Report

Commission authorize a limited investigation to determine the identity of the source and approve the use of compulsory process.

V. RECOMMENDATIONS

1. Find reason to believe that one or more Unknown Respondents violated 2 U.S.C. § 441d and 11 C.F.R. § 110.11 by failing to include the appropriate disclaimer information on its disseminated mailers.
2. Authorize the use of compulsory process in this matter, including the issuance of appropriate interrogatories, and document subpoenas, as necessary.

MUR 6441 (Unknown Respondent)
First General Counsel's Report

1

2

3

4

5

6

Date

7

8

9

10

11

12

13

14

15

16


17

5/15/12

Anthony T. Herman
General Counsel

BY:


Daniel A. Petalas
Associate General Counsel for Enforcement


Mark D. Shonkwiler
Assistant General Counsel


Kimberly D. Hart
Attorney

12044314807